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BROTHERS PHARMACY, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO DUARTE,

Plaintiff,

M&L BROTHERS PHARMACY,
INC., a California limited liability
company; a California corporation;
and Does 1-10,

Defendant.

Case No. CV 14-00029-ODW (Ex)

Hon. Otis D. Wright II

**REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION
REQUEST TO DECLINE SUPPLEMENTAL JURISDICTION**

Courtroom: 11

Hearing: Monday, October 27, 2014
Time: 1:30 p.m.

Trial: January 6, 2015

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I.

INTRODUCTION AND SUMMARY

2

3 In opposition to Defendant's motion for summary judgment, Plaintiff does
 4 not respond to the substantive issues in this case; rather, he ignores them. The fed-
 5 eral claims set forth in Plaintiff's complaint are moot. Plaintiff's only response is
 6 to argue about conditions that are *not* in his complaint.

7 As to the other so-called issues of fact, Plaintiff continues to argue that
 8 scores of parking spaces were present but none of them compliant, all the while ig-
 9 noring the undisputable fact that none of those spaces belonged to Defendant.
 10 Again, Plaintiff just chooses to ignore facts and thusly create – rather than identify
 11 – genuine triable issues of fact. Going through Plaintiff's statement of "relevant
 12 facts," one is left with the distinct impression that Plaintiff is not one to let facts get
 13 in the way of his story.

14 Ultimately, beyond why this Court should not deem the federal claim moot
 15 and decline supplemental jurisdiction over the state claims, the only real question
 16 is whether Plaintiff's state claims are meritless, premised on a timeline that simply
 17 could not have happened as Plaintiff described it.¹ That said, Defendant is not ask-
 18 ing for this Court to rule on the state claims but, rather, to decline to rule on them.

19 The federal claims in Plaintiff's complaint are moot. Plaintiff has not moved
 20 to amend the complaint nor, in his opposition, even hinted as much. This Court
 21 should see Plaintiff's opposition for what it is ... a study in issue avoidance.

22 Based on the foregoing, this Court should GRANT Defendant's motion for
 23 summary adjudication and dismiss the state claims without prejudice.

24

25

26 ¹ As set forth in Defendant's opposition to Plaintiff's motion for summary judg-
 27 ment, there are serious holes in Plaintiff's story, beginning with the fact that the
 28 pharmacy had been closed long before Plaintiff allegedly went searching for a pre-
 scripti

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II.

RESPONSE TO PLAINTIFF'S

SO-CALLED RELEVANT FACTS

4 In his opposition (Doc. 25), Plaintiff sets forth five paragraphs of what he
 5 calls relevant facts. In fact, almost all of them are irrelevant.

6 As to paragraph one (4:15-23),² none of these are controverted and certainly
 7 not relevant to the issues raised by Defendant's motion. Instead, each so-called fact
 8 rises to the level of "so what."

9 With respect to the second paragraph (4:24-5:2), there is a serious issue with
 10 the *story* regarding Plaintiff's visit in light of the fact that the pharmacy no longer
 11 existed as of more than a month before Plaintiff's visit and the parking lot had al-
 12 ready been restriped.

13 The third paragraph (5:3-10) then becomes largely irrelevant because it does
 14 not describe any condition of Defendant's portion of the parking lot. That Plaintiff
 15 chose to focus on someone else's parking lot is entirely irrelevant, whether that lot
 16 was adjacent or miles away.

17 The fourth paragraph (5:11-18) is revealing in light of Plaintiff's willingness
 18 to play with facts. He asserts that the parking lot was restriped after his visit but
 19 provides no authority for that claim. It is just a "fact" to be accepted, notwithstanding
 20 the fact that Defendant's declaration and evidence of payment more strongly
 21 suggest a date of restriping before Plaintiff allegedly visited the property.

22 Moreover, as to the claim of a slope in the parking stall, this claim appears
 23 nowhere in the complaint. As discussed in the following section, this is not just an
 24 issue for the federal claim but would pose a serious problem for Plaintiff's state
 25 claims because he never actually encountered the barrier.³

26 ² Page numbers stated are the ECF Document page number and not internal page
 27 numbers.

28 ³ For the obvious reason that he admitted to having not parked in the space.

1 Finally, as to the last paragraph (5:19-25), while there is little reason to
 2 doubt Plaintiff's "pleasure" about "discovering" this store, there is a rather serious
 3 question as to what really informs Plaintiff's emotional response to his discovery.
 4 There is nothing about the interior of the business that Plaintiff accurately de-
 5 scribed and, in fact, his description of events inside were nothing short of ludi-
 6 crous. Whether he is likely to return in the future is of little relevance. What is cer-
 7 tain is that he will not be returning to obtain prescriptions in light of the fact that
 8 the pharmacy does not exist and did not exist when last he allegedly visited.

9 In sum, Plaintiff's factual narrative is little more than a display of misdirec-
 10 tion, an assemblage of irrelevant matter that does not address the merits of Defend-
 11 ant's motion.

12 **1. THE FEDERAL CLAIMS ARE MOOT**

13 **A. Plaintiff's Claims Regarding Spaces Not Belonging to Defendant**
 14 **Are Irrelevant and Do Not Support Plaintiff's Federal Claims**
 15 **Against This Defendant**

16 With respect to the parking lot, Plaintiff claims that two issues preclude
 17 granting Defendant's motion. Plaintiff is wrong as to both of them.

18 Firstly, Plaintiff points to various signs and claims that these are proof that
 19 Defendant really owns, operates, or utilizes those other parking spaces.

20 As noted in the Declaration of Morgan Jones (Doc. 16-1, ¶5) and associated
 21 statement of fact (Doc 17, DF2), Defendant's business has only seven parking
 22 spaces and no others.

23 Moreover, as elaborated in Defendant's opposition to Plaintiff's motion, the
 24 signs to which Plaintiff points were not installed by Defendant and are not intended
 25 to add to or complement Defendant's parking or business. (Doc 22-1, ¶¶14-15) Ra-
 26 ther, they were installed by other business owners for reasons independent of De-
 27 fendant's business.

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B. Plaintiff Can Only Advance Claims Alleged in the Complaint and Not Raise New Claims in Opposition to Summary Adjudication In Order to Rescue His Moot Federal Claims

As far as the new allegations of noncompliant conditions raised in opposition to Defendant's Motion for Summary Adjudication, these should not be considered by the Court in ruling on Defendant's motion.

Rule 8 requires a plaintiff to identify the barriers that constitute the grounds for his ADA claim in the complaint itself. *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 909 (9th Cir. 2011) (“[A] plaintiff must identify the barriers that constitute the grounds for a claim of discrimination under the ADA in the complaint itself; a defendant is not deemed to have fair notice of barriers identified elsewhere.”).⁴

As noted in Defendant's moving papers, the only claims before this Court are those raised in Plaintiff's complaint – the alleged absence of painted parking space and access aisle.

Raising new claims in opposition briefs does not properly place them before this Court.

Plaintiff has not sought leave to file an amended Complaint. FRCP 8 requires a plaintiff to identify the barriers that constitute the grounds for his ADA claim in the complaint itself. *Oliver, supra*, 654 F.3d 903 at 909 (“[A] plaintiff must identify the barriers that constitute the grounds for a claim of discrimination under the ADA in the complaint itself; a defendant is not deemed to have fair notice of barriers identified elsewhere.”). As Plaintiff has failed to amend his Complaint, has failed to seek leave to amend his Complaint, and has failed to explain

⁴ Despite raising this legal issue in the context of Plaintiff’s motion for summary judgment (whether the attempt to introduce new claims is equally improper), Plaintiff does not even address this point anywhere in its rather short brief in opposition to Defendant’s motion. Nevertheless, ignoring Defendant’s argument does not make it disappear.

1 why he has chosen not to do either, this Court should decline to consider the new
 2 barriers that Plaintiff presented in his opposition to Defendant's motion.

3 **2. PLAINTIFF OFFERS NO ARGUMENT IN SUPPORT OF EXERCISING JURISDI-
 4 CION OVER THE STATE CLAIMS**

5 With respect to the state claims, Plaintiff makes no argument at all regarding
 6 the issue of whether this Court should exercise supplemental jurisdiction.

7 In light of Plaintiff's acquiescence on the matter, this Court can and should
 8 conclude that there are no grounds for retaining jurisdiction over the state claims.

9 **III.**

10 **CONCLUSION**

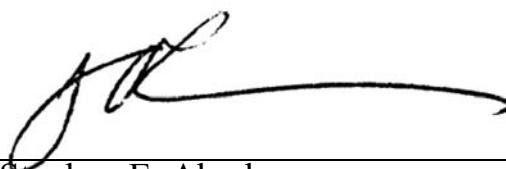
11 For the foregoing reasons, Defendant respectfully submits that its motion for
 12 summary adjudication should be GRANTED.

13 Furthermore, Defendant requests that this Court, taking up the issue of sub-
 14 ject matter jurisdiction at this moment in the litigation, having satisfied itself that
 15 the current conditions do not give rise to a claim for relief under the ADA, decline
 16 to exercise supplemental jurisdiction and dismiss this action.

17
 18 Dated: October 9, 2014

LAW OFFICES OF STEPHEN ABRAHAM

19
 20 By:



21 Stephen E. Abraham
 22 Attorneys for DEFENDANT M&L
 23 BROTHERS PHARMACY, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 1592 Pegasus Street, Newport Beach, California 92660.

On October 9, 2014, I served the foregoing document described as: **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY ADJUDICATION** thereon on all interested parties in this action as follows:

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e-Filing pursuant to Court order

Executed on October 9, 2014, at Newport Beach, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Stephen E. Abraham